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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DIANE ALBERTONI,

Plaintiff and Appellant,

v.

ROBERT MCNERNEY et al.,

Defendants and Respondents.

B283116

(Los Angeles County
Super. Ct. No. BC582876)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Edward Rico, Judge. Affirmed.

David Leeper, for Plaintiff and Appellant.

Norton & Melnik, Sonali Olson and Joel Witzman, for Defendant and Respondent Green Hills Memorial Park.

Diane Albertoni sued Green Hills Memorial Park for breach of contract, alleging Green Hills fraudulently entered into and “tortiously breached” two contracts for the sale of family burial crypts and negligently caused the family emotional distress by failing to provide a suitable resting place for the remains of Albertoni’s father, Richard Albertoni (Richard). After several rounds of demurrer the trial court ultimately dismissed the complaint after finding its allegations were vague and failed to state any cause of action.

We conclude that Albertoni failed to allege her standing to sue under a contract entered into by Richard, and failed to allege any compensable damages arising from breach of the contract entered into by her. We therefore affirm the judgment.

BACKGROUND

Because this case comes to us upon a judgment of dismissal after the sustaining of a demurrer without leave to amend, we take as true the facts alleged in the complaint.

In July 2010, Richard Albertoni contracted with Green Hills Memorial Park for the purchase of five family burial crypts in a section of Green Hills’s Park known as Pacific Terrace (the Pacific Terrace contract). He paid \$49,000. The crypts were not yet constructed, but Green Hills staff represented construction would be completed within approximately 10 months. At the time, Green Hills staff knew or should have known that the crypts would not be completed by the time Richard, who was elderly and ill, would need them.

Richard passed away two and a half years later, on February 27, 2012, but the Pacific Terrace crypts were still unfinished. Green Hills made a temporary holding area available to the family, but it was undignified, insecure, and unsuitable.

Green Hills showed the family a crypt in another area of the park, called “Chapel View,” and on March 13, 2013, two weeks after Richard’s death, Albertoni entered into an agreement with Green Hills to substitute the Chapel View location for the Pacific Terrace crypts.

Chapel View proved unsuitable as well, as it was frequently made inaccessible by parked cars, construction activity, and other obstacles, and the family would sometimes be “showered by water, dust, grass clippings, dirt, and miscellaneous debris caused by maintenance people” working on a hill immediately above the crypt. Green Hills showed Richard’s family another location, called Upper Dawn, and in April 2013 Albertoni entered into an agreement with Green Hills to purchase Upper Dawn crypts for \$198,000, less a \$39,000 credit from Richard’s Pacific Terrace contract (the Upper Dawn contract). Albertoni made a \$1,000 deposit, but in June 2013 Green Hills canceled the contract and tendered refund of the deposit, which Albertoni rejected.

In May 2015, Albertoni sued Green Hills and other defendants on her own behalf, alleging 15 causes of action for breach of contract, negligence, fraud, and unfair business practices. After several rounds of demurrer the third amended complaint was operative. In it, Albertoni alleged Green Hills breached the Pacific Terrace contract by failing to provide the crypts for which Richard had paid, and breached the Upper Dawn contract by canceling it. Albertoni has never quoted from nor attached either of the contracts.

Green Hills demurred to the third amended complaint, arguing Albertoni lacked standing to enforce the Pacific Terrace contract because she was neither a party to it nor an intended

beneficiary, and failed through vague pleading to allege Green Hills breached the Upper Dawn contract. The trial court agreed, sustained the demurrer without leave to amend, and dismissed the complaint. This appeal followed.

DISCUSSION

On review of a trial court's order sustaining a demurrer we "examine the complaint de novo." (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415.) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

A. Pacific Terrace Contract

The elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and resulting damages. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

Albertoni alleges no contract between her and Green Hills. Nor does she allege facts suggesting she was a third party beneficiary of the specific portion of the Pacific Terrace contract she alleges was breached.

“Civil Code section 1559 provides: ‘A contract, made expressly for the benefit of a third person, may be enforced by him’ A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that third party and such intent appears on the terms of the contract. [Citation.] However, it is well settled that Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by it. [Citations.] ‘ “A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties’ intent to benefit him. . . .” ’ [Citations.] . . . [¶] The fact that the third party is only incidentally named in the contract or that the contract, if carried out to its terms, would inure to the third party’s benefit is insufficient to entitle him or her to demand enforcement. [Citation.] Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties’ intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered.” (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1724-1725.)

Albertoni alleges no facts suggesting that Green Hills intended to benefit her specifically. And because she neither quotes from nor attaches the contract, no basis exists to infer that the parties specifically intended to benefit her. That the Pacific Terrace contract would inure to Albertoni’s benefit, i.e., by providing a resting place for her father’s remains, does not entitle her to demand enforcement. (Another Green Hills obligation under the contract, to provide a crypt for Albertoni herself, *was*

intended specifically to benefit her, but Albertoni does not allege Green Hills breached this obligation.)

Albertoni contends Green Hills is nevertheless liable to her for breach of contract because under *Christensen v. Superior Court* (1991) 54 Cal.3d 868 (*Christensen*), close, “aware” family members have standing to enforce contracts for funeral-related services regardless of who signed the contract. We disagree.

In *Christensen*, the defendants harvested the organs of decedents without permission, removed gold and other metals, cremated several bodies together, and otherwise mishandled remains. The issue was whether persons other than those who contract for the services of mortuaries “may recover damages for emotional distress engendered by knowledge of the negligent or intentional mishandling of the decedent’s remains.” (*Christensen, supra*, 54 Cal.3d at p. 875.) Our Supreme Court held that a duty in tort is owed “to close family members who were aware . . . and on whose behalf or for whose benefit the services were rendered.” (*Ibid.*)

Here, Albertoni alleged no mishandling of Richard’s remains, she alleged only that the crypt in which the remains were to be placed was unavailable and the offered replacements unsuitable. We decline to extend *Christensen* to funerary arrangements other than the actual handling of a decedent’s remains.

B. Upper Dawn Contract

Albertoni alleges that after Pacific Terrace proved unavailable and Chapel View unsuitable, Green Hills offered Upper Dawn, and “Per written agreement between the parties, plaintiff made a \$1,000 deposit by check . . . towards the purchase price of \$198,000,” less a \$39,000 credit for surrender of the

Pacific Terrace crypts. However, Green Hills refunded the deposit 12 days later in an “apparent attempt to cancel the contract.” Albertoni alleges Green Hills breached the contract by canceling it and “by attempting to give plaintiff a credit of only \$39,000, without explanation of the reason(s), instead of the \$49,987 plaintiff’s family had paid.” As a result of the breach, Albertoni alleges she “suffered emotional distress and mental anguish damages, of at least \$25,000.”

The only terms of the Upper Dawn contract inferable from this pleading are that Green Hills offered to provide crypts for \$198,000, less a \$39,000 credit. Albertoni accepted the offer by depositing \$1,000.

Albertoni alleges no facts suggesting that return of her deposit constituted a breach of the contract. And of course a term of the contract—the \$39,000 credit—cannot itself constitute a breach. But we will assume for purposes of argument that Green Hills committed an anticipatory breach by canceling the contract. (See *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489 [“if a party to a contract expressly or by implication repudiates the contract before the time for his or her performance has arrived, an anticipatory breach is said to have occurred”].)

The action nevertheless fails because Albertoni alleged no compensable damages.

“Damages for emotional disturbance are not ordinarily allowed” as a remedy for breach of contract. (Rest.2d Contracts (1981) § 353.) Some jurisdictions recognize an exception where “the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result,” such as “contracts for the carriage or proper disposition of dead bodies.” (*Ibid.*) But Green Hills offered neither to carry nor dispose of

Richard's remains, but merely to provide a resting place for them. Serious emotional disturbance would not be particularly likely to result from breach of the contract because nothing in the complaint suggests Albertoni could not simply find another cemetery to take Richard.

On this point *Erlich v. Menezes* (1999) 21 Cal.4th 543 is instructive. There, the question was: "[I]s the mere negligent breach of a contract sufficient" to recover damages for emotional distress? As our Supreme Court stated, "The answer is no." (*Id.* at p. 552.) "[C]ourts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies." (*Ibid.*) Outside the insurance context, "a tortious breach of contract . . . may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion or," as pertinent here, "(3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages." (*Id.* at pp. 553-554.) "Focusing on intentional conduct gives substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is violated. [Citation.] If every negligent breach of a contract gives rise to tort damages the limitation would be meaningless, as would the statutory distinction between tort and contract remedies." (*Id.* at p. 554.)

The Court stated that "[I]n holding that a tort action is available for breach of the covenant in an insurance contract, we

have ‘emphasized the “special relationship” between insurer and insured, characterized by elements of public interest, adhesion, and fiduciary responsibility.’” (*Erlich v. Menezes, supra*, 21 Cal.4th at pp. 552-553.) But the court found the special relationship test had little relevance where the obligor was one among several contractors who provide the same service, and the obligees could take their business elsewhere. (*Id.* at p. 553.)

Similarly here, Albertoni alleges nothing to indicate she could not have purchased burial crypts for Richard at any of a number of cemeteries. Therefore, breach of the Upper Dawn contract could not have been anticipated to cause severe, unmitigable harm in the form of mental anguish or personal hardship.

C. Conclusion

Because Albertoni alleged no facts indicating she had standing under the Pacific Terrace contract or compensable damages under the Upper Dawn contract, Green Hills’s demurrer was properly sustained. Because Albertoni in four iterations of the complaint has been unable to state a cognizable theory, and none appears from the record, leave to amend was properly denied.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.